82-967

In The

Supreme Court of the United States

October Term, 1982

No. .....

LEE ISENBERG,

Petitioner,

— v. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CRIMINAL MATTER

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December 10, 1982

Preliminary Matters

1. Questions Presented

1. Does a jury charge which singles out the credibility of the defendant and calls to the attention of the jury his interest in the outcome of the case violate the due process rights guaranteed the petitioner by the Fifth Amendment to the United States Constitution?

2. In a prosecution for violation of 18 United States Code, Section 1001 (making false and fraudulent statements), does a jury charge which charges the jury that the materiality of the allegedly false statement is a matter of law for the court to determine and not a matter of fact for the jury violate the petitioner's rights to due process and to trial by jury as guaranteed by the Fifth and Sixth Amendments to the United States Constitution?

2. List Of All Parties

All parties appear in the caption of the case in this Court.

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The petitioner Lee Isenberg respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 12, 1982.

Opinion Below

The affirmance without formal opinion of the Court of Appeals appears in the Appendix hereto. No opinion was

rendered by the District Court for the District of Connecticut.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 12, 1982.

The present petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

United States Code, Title 18 § 1001.

Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Statement of the Case

On October 20, 1980, Edward Isenberg and Lee Isenberg were charged by indictment with fifty-eight counts of violations of federal law. In essence, the indictment charged petitioner and his brother with three crimes: a conspiracy to defraud the United States government, the theft of assets, in the form of services performed for a third

party and paid for by the United States government, and the making and filing of false and fraudulent statements to an agency of the United States government. More specifically, count one alleges that from on or about October 21, 1975 and continuing to on or about December 31, 1979 Edward Isenberg and Lee Isenberg conspired together and with an unindicted co-conspirator, Ralph Cardone, (1) to defraud the United States by hindering, impairing, obstructing, and defeating the lawful administration and implementation of the Comprehensive Employment and Training Act of 1973 (hereinafter "CETA"); (2) to willfully misapply, steal and obtain by fraud moneys, funds and assets of Associated Restaurants of Connecticut Consortium * (hereinafter "AROC Consortium") which received grants and contracts of assistance pursuant to CETA and to knowingly hire ineligible individuals for employment in CETA programs; and (3) to violate § 1001 of Title 18 of the United States Code by making false or fraudulent statements or representations to an agency of the United States government.

Counts two through thirty-three of the indictment allege that Edward Isenberg, Lee Isenberg and Ralph Cardone, aided and abetted by each other, caused thirteen individuals to perform services for Lee Isenberg Associates, Inc. (hereinafter "LIA") and Associated Restaurants of Connecticut, Inc. (a trade association not related to the CETA training programs, hereinafter "AROC") and other services not related to the CETA contracts, and be compensated from CETA moneys and funds, all in

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* Defined in the indictment as including the following entities: Associated Restaurants of Connecticut Central Connecticut Services Industries Consortium, Inc., Associated Restaurants of Connecticut New Haven County Service Industries Consortium, Inc., Associated Restaurants of Connecticut Fairfield County Service Industries Consortium, Inc. and Food Service Industry Training Project, Inc.

violation of Sections 2 and 665 of Title 18 of the United States Code.

Counts thirty-four through fifty-eight allege that Edward Isenberg, Lee Isenberg and Ralph Cardone made false, fictitious and fraudulent statements in violation of Sections 2 and 1001 of Title 18 of the United States Code in connection with the submission of 25 invoices to Connecticut CETA prime sponsors.

On November 20, 1981 the jury returned a verdict of guilty as to all 58 counts against petitioner and a verdict of guilty as to seventeen counts and not guilty as to the remaining counts against defendant Edward Isenberg.

On January 4, 1982, District Court Judge T. Emmet Clarie overturned the jury's guilty findings as to defendant Edward Isenberg and granted a motion for judgment of acquittal. On the same date the court denied petitioner's written motions for Judgment of Acquittal and for a New Trial and imposed sentence on petitioner as follows: Count # 1—3 years imprisonment and committed fine of $10,000, execution of sentence of imprisonment suspended after serving 90 days whereupon defendant shall be placed on 2 years probation; Counts # 2 through 58 —2 years imprisonment, execution of sentence suspended after serving 90 days whereupon defendant shall be placed on 2 years probation. As to Counts 2 through 5 the court also ordered a $5,000 committed fine as to each Count, the total fine being $30,000. The sentence of imprisonment on Counts 2 through 58 was ordered to run concurrent with the sentence imposed on Count 1.

A timely Notice of Appeal was filed by the petitioner in the United States Court of Appeals for the Second Circuit. On November 12, 1982 a summary affirmance of the judgment of conviction was issued by that court.

Statement of the Facts

1. Formation of Lee Isenberg Associates and the Early Training Programs

In 1957, petitioner Lee Isenberg, after managing the Retail Trade Board for the Greater Hartford Chamber of Commerce for nine years, left that organization to open a trade association management business. (Isenberg, L. T.T. 3383-84) The name of the business was Lee Isenberg Associates ("LIA") (Isenberg, L., T.T. 3384) and its purpose was to serve small business associations that could not afford to hire full-time executive directors. (Isenberg, L., T.T. 3385)

LIA was formed as a partnership. (Isenberg, L., T.T. 3384-85) In January of 1971, LIA was restructured as a corporation with the ownership of the shares divided between Lee Isenberg, his brothers Charles Isenberg and Edward Isenberg and Arthur Schuman. Lee Isenberg gave the shares to his brothers and Arthur Schuman in recognition of their efforts on behalf of LIA. (Isenberg, L., T.T. 3420-22)

After developing an experimental training program in the tool and die industry under the original Manpower Training Act (Isenberg, L., T.T. 3391), petitioner became interested in using a similar program for training chefs. (Isenberg, L., T.T. 3391) One of LIA's clients was the Associated Restaurants of Connecticut (AROC), a trade association formed to protect the interests of Connecticut restaurateurs. (Zakos, T.T. 277-78) After running a pioneer program for chef training in Connecticut, petitioner extended his chef training program to 17 other states. (Isenberg, L., T.T. 3393-95)

In 1970, at the suggestion of his outside accountants, petitioner hired an in-house accountant, Ralph Cardone,

to straighten out the bookkeeping snarl that had resulted from the administration of the national training programs. (Isenberg, L., T.T. 3401-02) Cardone was to put the financial affairs of the training program in order and to collect sums owed to the Food Service Industry Training Project (FSITP) by the United States government on a number of individual state contracts. (Cardone; Isenberg, L., T.T. 2091; 3403) In the early 1970's, Cardone was successful in obtaining reimbursement of $60,000 of the amounts owed by the federal government. (Isenberg, L., 3405-06).

In late 1969, before Ralph Cardone was hired, FSITP was audited for 6-8 weeks by the U.S. Department of Labor. (Isenberg, L., T.T. 3400-01) As a result of that audit the Department of Labor made a $47,000 claim against FSITP for questioned costs. (Isenberg, L., T.T. 3409) In an administrative proceeding, the $47,000 claim of the government was denied and FSITP's counterclaim against the government in the amount of $49,000 was upheld. (Isenberg, L., T.T. 3410)

In 1973, Congress passed the Comprehensive Employment and Training Act ("CETA") and with CETA came a shift away from the national administration of training programs to a local one. (Isenberg, L., T.T. 3411) The initial contracts under the CETA program were fixed fee contracts (Isenberg, L., T.T. 3429) under which a fixed percentage of the total contract amount was allocated to administrative costs. (Cardone, T.T. 2360) It was petitioner's understanding, based on advice of his Washington counsel, that under the fixed fee contracts, if administrative costs for the training programs exceeded the fee negotiated under the contract, there was a loss to the programs, whereas if there was any excess, it belonged to the programs. (Isenberg, L., T.T. 3429) The surplus funds generated under the fixed fee contracts remained in the FSITP accounts and in 1974, 1975 and into 1976

amounted to somewhere between $100,000 and $150,000. (Cardone; Isenberg, L., T.T. 2764; 3430)

As the accountant for the food services training programs under CETA in the period 1976 through 1978, Cardone dealt with two different kinds of contracts: fixed price contracts and cost reimbursement contracts. (Cardone, T.T. 2131) Under the fixed price contracts, in order for payment from the government to be triggered, the training programs only had to establish and document that trainess were at the job site. (Cardone, T.T. 2358) There was no direct chargeback against the contract for reimbursement of individual costs. Under the cost reimbursement contracts, not only did the fact that trainees were working have to be substantiated, but specific costs such as personnel and rent also had to be detailed. (Cardone, T.T. 2359)

Records maintained under the two kinds of contracts also differed. Under the fixed price contracts, only training records to prove the attendance of trainees at the restaurants at which they were employed were kept. (Cardone, T.T. 2360) Itemized ledgers showing the hours worked by particular administrative employees of the program were not kept until cost reimbursement contracts were instituted. (Cardone, T.T. 2360) The first cost reimbursement contract was not entered into until September, 1976, and the first invoicing or substantiation of claimed expenses under a cost reimbursement contract was not made until May, 1977. (Cardone, T.T. 2825)

2. How the CETA Chef Training Programs Worked.

Training consultants or "coach counselors" were responsible for the day-to-day operation of the chef training program administered by FSITP under the various CETA programs. To be eligible for a CETA program a person

had to be unemployed or underemployed and had to meet certain income requirements. (Yoczik, T.T. 555-56) After a trainee was accepted, the coach counselors placed the trainee in a training site, usually a restaurant. (Yoczik, T.T. 560-61; 565-66) Under the programs, participating employers were eligible for an approximate daily reimbursement allowance of $6.00 per trainee for the first 180 days of the trainee's employment. (Yoczik, T.T. 561-62)

As part of their job of monitoring trainees to make sure they received adequate training and worked the appropriate number of hours, the coach counselors were required to supervise the completion of various forms which were placed in each trainee's file. (Yoczik; Isenberg, L., T.T. 655; 572; 3434) These forms were referred to as "blue sheets," "OJT forms," and "JRE forms." All three forms, conceived by the administrators of the training programs, were not CETA forms and were not provided by the government. (Yoczik, T.T. 667-68)

Several of the coach counselors admitted to falsifying records, including these forms and CETA intake forms. (Yoczik; Burvick; Shurk, T.T. 599; 750; 889) But to Ralph Cardone's knowledge, petitioner never told any of the coach counselors to falsify blue sheets. Neither did he tell Cardone to have blue sheets falsified or to falsify records himself. (Cardone, T.T. 2699) All petitioner ever told Cardone with regard to blue sheets was to make sure before audit periods that records were updated and that whatever was missing be redone in accordance with the master control sheet. (Cardone, T.T. 2699)

There was testimony that petitioner told the coach counselors that trainees were needed on the roster and that he didn't care how the counselors did it, just do it and don't get caught. (Shurk, T.T. 909) Petitioner denied ever making such a statement. (Isenberg, L., T.T. 3438) One counselor also testified that he spent a week in Hartford falsifying paperwork and that petitioner knew he was

there. (Burvick, T.T. 753, 841) Petitioner denied any knowledge of the counselor's illegal actions. (Isenberg, L., T.T. 3437-38)

3. The Conspiracy

The only testimony about the nature, extent and purposes of the conspiracy came from Ralph Cardone, the chief government witness and an unindicted co-conspirator. Cardone served as Chief Accountant for the food services programs and LIA from 1970 (Cardone, T.T. 2086) until June of 1980). (Isenberg, L., T.T. 3477) On October 26, 1981, as the result of an agreement entered into by Cardone and the government on July 23, 1979, Ralph Cardone pled guilty to a one-count information charging him with violations of sections 665 and 2 of the United States Code, theft and aiding and abetting the theft of CETA funds. (Cardone, T.T. 2087).

When asked with whom he conspired, Cardone said that the conspiracy consisted only of petitioner and himself and not Edward Isenberg. (Cardone, T.T. 2672) When asked when he entered into a plan of conspiracy with Lee, his response was: "I don't think we ever entered into a plan together. I think it was an outgrowth of something that existed." (Cardone, T.T. 2672) Further, in response to the question "You never entered into a plan together? You mean you just both were functioning down two separate lines right?" Cardone answered: "Correct. We were perpetrating something that existed." (Cardone, T.T. 2672)

4. The Theft of Services

As to the "something that existed," Cardone's belief was that the "crime" of "cost absorption" was taking place when he first started working for LIA and the food service programs in 1970. (Cardone, T.T. 2668). Under the fixed fee contracts then in place, Cardone opined that

the fee for services charged should not be used to compensate an employee who also worked on other unrelated work or different contracts and that such a practice was in fact double billing or "cost absorption." (Cardone, T.T. 2667-68; 2534).

When asked what the plan to defraud the United States with Lee Isenberg was, Cardone responded that the plan was to have people paid for by the government working for LIA. (Cardone, T.T. 2711). However, he did not enter into any agreement with Lee as to the plan in 1970, he "just continued the job for which [he] inherited." (Cardone, T.T. 2710-11).

Petitioner said that he had no discussions with Cardone in the pre-'77 period about the use of LIA personnel on fixed price contracts. He also said that from October 21, 1975 until May of 1977 he never got together with Cardone to conspire to somehow defraud the United States Government. (Isenberg, L., T.T. 3452). Both before and after cost reimbursement contracts were entered into, he believed, on Cardone's representation, that Cardone was keeping a cost allocation system under which if training service people were being used by LIA there was an appropriate charge back made. (Isenberg, L., T.T. 3452-53). Arthur Schuman, an employee of LIA since 1958 and a part owner from 1971 on (Schuman, T.T. 2951, 2953-54) also said that he understood from both Cardone and petitioner that there was a cost accounting for employees who were paid on the government account and who performed non-government work under which the government was eventually reimbursed. (Schuman, T.T. 2979-80).

5. The Invoices

In order to receive payment for expenses incurred under the cost reimbursement contracts, invoices had to be submitted to the prime sponsors, usually at monthly

intervals. (Cardone, T.T. 2414; 2775). In reviewing certain invoices submitted under these contracts Cardone said that in each instance the invoice contained false information in that hours, salaries, and wages were inflated. (Cardone, T.T. 2409-2494). Cardone prepared the information in the invoices, signed them himself and submitted them to prime sponsors for payment. (Cardone, T.T. 2472).

Although Cardone said that he was directed to falsify the invoices by Lee Isenberg, there was no evidence that Lee Isenberg signed any of the invoices. Further, Lee himself did not recognize any of the invoices shown to him and did not review them before they were submitted. (Isenberg, L., T.T. 3514-15).

Cardone testified that he believed that Lee Isenberg personally benefitted from the conspiracy and falsification of records in the following way. Because personnel were doing work for LIA clients and being paid for their services on a government payroll, during the years of the conspiracy LIA received an annual monetary benefit in the amount of the value of the services performed by those personnel. (Cardone, T.T. 2521). Petitioner then received a personal monetary gain in two ways. First, the profits of LIA were inflated, thus causing his salary and his share of company profits to be inflated. Second, Cardone believed that petitioner personally benefitted from the monthly transfer of funds to other entities in which petitioner or his family had an interest. (Cardone, T.T. 2615-19).

6. Surplus Funds

Both Cardone and petitioner testified about surplus funds in the food service accounts and about the payment of some FSITP expenses which were not reimbursed by the government. A summary of the amounts of surplus funds in the food service accounts and of expenses in-

curred by FSITP and not reimbursed by the government is as follows:

D.O.L. Settlement	$ 49,000
Recapture by Cardone (States)	60,000
Build up of Surplus Funds	150,000
Interest Charges (Loans to CETA)	45,000
Amounts Owed by City of Hartford	60,000
Amounts Owed by City of New Haven	7,000
Subsidize Cardone's Salary	15,000
Lee Isenberg Time Unreimbursed by U.S. Government	75,000
Interim Loans (Cash Flow)	1,500
Investment of FSITP Funds	6,000
Prison Project	2,500
Newspaper Ads	5,000
LIA personnel used on FSITP	30,000
Indirect Overhead	15,000

See also Record, Stipulation filed January 11, 1982.

Reasons for Granting the Writ

This case shows how a complex legal relationship between the government and a citizen can be characterized as criminal behavior merely because the government chooses to treat it that way. Thereafter, it is a one way battle in which the claims of the citizen against his government do not surface because on the face of the criminal prosecution, they are not germane. Throughout this case, petitioner claimed that his conduct simply was not criminal. To the extent a dispute existed at all it was civil in nature and should have been treated as such with both sides having an opportunity to present their respective claims. However, a criminal trial presents no opportunity to assert counterclaims or to prove the weakness of the government's position through appropriate civil discovery.

The Court should grant a writ of certiorari herein because, in view of the tangled regulations and the uncer-

tain and ever-changing administration of the CETA program as a whole, the case of a volunteer citizen who becomes enmeshed in the bureaucratic maze of administrative law only to find that he is being accused of criminal wrongdoing, deserves careful scrutiny to ensure that his constitutional protections have been observed to the fullest. Numerous legal issues were presented to both the trial court and the court of appeals. As outlined below, the petitioner herein was denied fundamental fairness in a number of key areas of the law where sharp disagreement exists among the circuits and the states. This petition has been limited to these areas. The issues presented herein are of substantial importance in criminal proceedings throughout the country.

I. The Decision Below Affirming the Trial Court's Charge to the Jury on the Petitioner's Testimony, Which Called to the Attention of the Jury His Interest in the Outcome of the Case, Conflicts with the Decisions of Other Courts of Appeal.

A clear conflict exists among the decisions of the various circuits and the highest courts of several states as to the treatment to be accorded by the jury to the testimony of a defendant who testifies on his own behalf.[1] This Court has consistently held that the testimony of a defendant witness is to be accorded the same weight as that of any other witness. However, no decision touching on this subject has been issued by this Court since 1933.[2] In the interim, a conflicting body of law has developed as to how the testimony of a defendant/witness is to be treated by the jury.

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[1] See Appendix, p. 6a *infra* for the trial court's charge on the credibility of the petitioner, who testified on his own behalf.

[2] *Quercia* v. *United States*, 289 U.S. 466 (1933).

Although the presumption of innocence is not specifically mentioned in the Constitution, this Court has said that it is "the undoubted law, axiomatic and elementary and its enforcement lies at the foundaiton of the administration of our criminal law." *Coffin* v. *United States*, 156 U.S. 432, 453 (1895). The presumption of innocence ranks among the "safeguards of a fair procedure" that have been accorded constitutional status. *Deutch* v. *United States*, 367 U.S. 456, 471 (1961). Inherent in the presumption of innocence is the concept that the accused stands before the jury on an equal footing with any other person, entitled to no consideration, either favorable or unfavorable, different from that any other person merits. *Swanson* v. *State*, 222 Ind. 217, 52 N.E.2d 616, 617-18 (1944). To hold otherwise is to make a mockery of the presumption. Either the accused has equality before the jury or he does not. If he does not, then he is not presumed to be innocent but rather he is presumed to be something else which requires the jury to pay special attention to what he has to say.

In *Hicks* v. *United States*, 150 U.S. 442 (1893), this Court held that an instruction which said that the jury should consider the interest the defendant had in the result of the case was erroneous and refused to speculate as to what effect it might have had on the jury. In *Allison* v. *United States*, 160 U.S. 203, 207 (1895), the Court, relying on *Hicks*, again said it was for the jury to test the credibility of the defendant, uninfluenced by an instruction which might strip him of his competency as a witness. Then in *Wilson* v. *United States*, 162 U.S. 613, 621 (1896), the Court, referring once again to *Hicks*, and *Allison*, upheld a conviction because the trial court specifically did not charge the jury to treat the defendant's testimony in a manner different from the other witnesses.

Finally, in *Quercia* v. *United States*, 289 U.S. 466, 471 (1933), this Court reaffirmed the rule from *Allison*

that the weight to be given the defendant's testimony lies within the exclusive province of the jury "uninfluenced by instructions which might operate to strip him of [his] competency." This Court has not ruled on the subject of the weight to be given the testimony of a defendant witness since *Quercia*. As a result, there is a direct division among the circuits as to how to treat such testimony.

The Second Circuit Court of Appeals has upheld a charge calling attention to the defendant's interest in the case [3] but has done so gingerly pointing out that a balancing charge to the effect that such interest is not inconsistent with the defendant's ability to tell the truth is preferable.[4]

The Eighth Circuit, however, has condemned the use of a charge calling the jury's attention to any interest the defendant might have in the outcome of the case. In a series of cases, the Eighth Circuit first warned the District Courts it "preferred" that the defendant not be singled out,[5] then said that the continued use of such a charge could cause the court to rule *per se* that it is erroneous,[6] and finally that such a charge should not be used "especially in a case where much depends upon the defendant's credibility." [7] In the present case, the petitioner's credibility was directly on the line since most of

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[3] *United States* v. *Martin*, 525 F.2d 703, 706-7, n.3 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975).

[4] *United States* v. *Schlesinger*, 598 F.2d 722, 727 (2d Cir.), *cert. denied*, 444 U.S. 880 (1979); *United States* v. *Hernandez*, 588 F.2d 346, 349 (2d Cir. 1978); *United States* v. *Rucker*, 586 F.2d 899, 904 (2d Cir. 1978); *United States* v. *Floyd*, 555 F.2d 45, 47, n.4 (2d Cir.), *cert. denied*, 434 U.S. 851 (1977).

[5] *United States* v. *Brown*, 453 F.2d 101, 107 (8th Cir.), *cert. denied*, 405 U.S. 978 (1972).

[6] *United States* v. *Bear Killer*, 534 F.2d 1253, 1260 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976).

[7] *United States* v. *Standing Soldier*, 538 F.2d 196, 204 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976).

what he testified to was in direct conflict with the government's key witness, Ralph Cardone.

A similar conflict exists among the state courts on this type of charge. As a result of the line of cases in the Eighth Circuit cited above, Minnesota [8] joined Indiana,[9] Mississippi,[10] Missouri [11] and Iowa [12] in overturning convictions because a charge singling out the defendant was utilized.[13] On the other hand, the Connecticut Supreme Court has upheld a charge singling out the defendant [14] although in its most recent pronouncement,[15] the court reluctantly upheld the charge saying:

> This is not to say that at some future [16] time this court, especially in the case of a material violation

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[8] *State* v. *Underwood*, 281 N.W.2d 337 (Minn. 1979).

[9] *Garvin* v. *State*, 263 N.E.2d 371 (Ind. 1970); *Barnett* v. *State*, 240 Ind. 129, 161 N.E.2d 444 (1959); *Alder* v. *State*, 239 Ind. 68, 154 N.E.2d 716 (1958).

[10] *Hall* v. *State*, 250 Miss. 253, 165 So.2d 345 (1964).

[11] *State* v. *Finkelstein*, 269 Mo. 612, 191 S.W. 1002 (1917).

[12] *Iowa* v. *Bester*, 167 N.W. 2d 705 (Iowa 1969); *State* v. *Allnutt*, 156 N.W.2d 266 (Iowa 1968); *State* v. *Gibson*, 228 Iowa 748, 292 N.W. 786 (1940).

[13] *See also Annot.*, 85 A.L.R. 523, 577 (1933) noting such a charge to be prejudicially erroneous in Arizona, California, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, South Carolina and Texas.

[14] *State* v. *Mastropetre*, 175 Conn. 512, 400 A.2d 276 (1978) (Bogdanski, J. dissenting on this issue); *State* v. *Bennett*, 172 Conn. 324, 374 A.2d 247 (1977) (Bogdanski, J. dissenting on this issue); *State* v. *Jonas*, 169 Conn. 566, 363 A.2d 1378 (1975), *cert. denied*, 424 U.S. 923 (1976) (Bogdanski, J. dissenting on this issue); *State* v. *Guthridge*, 164 Conn. 145, 318 A.2d 87 (1972), *cert. denied*, 410 U.S. 988 (1973); *State* v. *Palko*, 122 Conn. 529, 191 A. 320, *aff'd*, 302 U.S. 319 (1937); *State* v. *Schleifer*, 102 Conn. 708, 130 A. 184 (1925).

[15] *State* v. *Kurvin*, 186 Conn. 555, 570, n.3, 442 A.2d 1327 (1982).

[16] The issue is again on appeal to the Connecticut Supreme Court in *State* v. *Stepney*, Conn. Supreme Court Docket No. 10574.

of the language used here, might not reconsider the question of whether such a reference in the charge amounts to a violation of the defendant's due process rights either under the state or federal constitution.

From the foregoing review of the state and federal case law, it is apparent that a substantial body of conflicting case law exists on the treatment to be accorded a defendant's testimony. In the present case, in which a very complicated factual pattern emerged, the petitioner, a 59 year old businessman who had led a crime free life, was pitted against the government's cooperating witness. His testimony was entitled to go to the jury unfettered by a charge that it should consider his interest in the outcome of the case in weighing what credence, if any, to give him. This case presents an issue of substantial constitutional importance which needs clarification for the courts throughout the country.

II. The Decision Below Affirming the Trial Court's Charge to the Jury that the Issue of the Materiality of a False Statement Under Section 1001 of Title 18 of the United States Code is a Question of Law for the Judge and Not One of Fact for the Jury is in Conflict with Decisions of Other Courts of Appeal.

The various circuits appear to be deeply divided over whether or not materiality is an essential element of proof in a prosecution for making false and fraudulent statements. In the decision below, the Second Circuit summarily said that materiality is a question for the court and that the jury charge [17] was correct. That appears to be the well settled rule in this Circuit. [18]

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[17] See Appendix, *infra* p. 5a for the district court's jury charge on the issue of materiality.

[18] *United States* v. *Cleary*, 565 F.2d 43 (2d Cir. 1977), *cert.*

[Footnote continued on following page]

However, the Tenth Circuit is equally clear in holding that materiality is an "essential element of offenses defined by 18 U.S.C.A. § 1001" and that "there must be sufficient Government proof under the standard applied in criminal cases that the alleged misstatement was material." [19] In *United States* v. *Irwin*, 654 F.2d 671, 677 (10th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3783 (1982), the court upheld the conviction because the issue of materiality had been properly submitted to the jury for consideration. There the court told the jury:

> A material statement of fact is one that has a natural tendency or is capable of inducing action by the agency . . .

This instruction left it up to the jury to decide whether the allegedly false statements were material. The effect of the charge by the court in the present action was to tell the jury that the allegedly false statements were both in fact and law material. This had the subtle effect of making the jury believe that the trial judge felt that the petitioner indeed had made material false statements.

The District of Columbia Circuit has said that "this highly, penal statute [18 U.S.C. § 1001] must be construed as requiring a material falsification" and that "the legislative purpose strongly implies that only material false statements were contemplated." [20] The Ninth Circuit has

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denied sub nom. Passarelli v. *United States*, 435 U.S. 915 (1978); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965); *United States* v. *Alu*, 246 F.2d 29, 32 (2d Cir. 1957). *See also United States* v. *Pereira*, 463 F. Supp. 481, 486 (E.D.N.Y. 1978).

[19] *United States* v. *Radetsky*, 535 F.2d 556, 571 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976). *See also, Gonzales* v. *United States*, 286 F.2d 118 (10th Cir.), *cert. denied*, 365 U.S. 878 (1961). *See also Poulos* v. *United States*, 387 F.2d 4, 6 (10th Cir. 1968).

[20] *Freidus* v. *United States*, 223 F.2d 598, 601 (D.C. Cir. 1955).

noted that "the law is well settled in this Circuit that materiality of the falsification is an essential element of the offenses defined in 18 U.S.C. § 1001" [21] and has said that the failure to so charge the jury is erroneous.

The Eighth Circuit has also held that materiality is an essential element of a charge under 18 U.S.C. § 1001 and that a jury should be properly instructed as to its meaning.[22] *See United States* v. *Johnson*, 284 F. Supp. 273 (W.D. Mo. 1968), *aff'd*, 410 F.2d 38 (8th Cir.), *cert. denied*, 396 U.S. 822 (1969), in which the district court approved a jury instruction which stated in part:

> an essential element of the offense of making a false, fictitious and fraudulent statement . . . is that the statement be 'material'. In determining whether such a statement is material, the test is whether it has a natural tendency to influence or was capable of influencing agency action . . . . If you find beyond a reasonable doubt that defendant's statement . . . had a natural tendency to influence or was capable of influencing the agency . . . , then you should find that such statement was material.

The Fifth Circuit has dismissed [23] an indictment because of the failure to allege materiality which it held to be an essential element of a prosecution under 18 U.S.C. § 1001 and has affirmed [24] a lower court's dismissal of an indictment on the ground that the allegedly false

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[21] *United States* v. *East*, 416 F.2d 351, 353 (9th Cir. 1969). Erroneous charge held not to be prejudicial since materiality had been established as a matter of law. *See also United States* v. *Talkington*, 589 F.2d 415, 416 (9th Cir. 1979); *United States* v. *Deep*, 497 F.2d 1316, 1321 (9th Cir. 1974) (en banc).

[22] *United States* v. *Voorhees*, 593 F.2d 346, 349 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979).

[23] *Rolland* v. *United States*, 200 F.2d 678, 679 (5th Cir.), *cert. denied*, 345 U.S. 964 (1953).

[24] *United States* v. *Moore*, 185 F.2d 92, 94 (5th Cir. 1950).

statements were not material because the defendant was not subject to the act in question.

From the foregoing, it can be seen that a significant division exists among the circuits as to the issue of materiality. In a case such as the present one, the petitioner was entitled to have the issue of materiality decided by the jury. This court should grant a writ of certiorari to review the issue in more detail.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel for Petitioner

With whom on the
petition was
Sally S. King.

December 10, 1982

Opinion of the District Court

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November, one thousand nine hundred and eighty-two.
Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE JON O. NEWMAN,
Circuit Judges.

82-1040

UNITED STATES OF AMERICA,

Appellee,

v.

LEE ISENBERG,

Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Isenberg contends Judge Clarie erred by denying his motion for judgment of acquittal as to the conspiracy count (Count I), the theft counts (Counts II-XXXIII), and the false statement counts (Counts XXXIV-LVIII). Appellant's arguments are without merit.

2. Three claims are raised concerning Count I. Isenberg urges that to the extent a conspiracy was proved at all, it occurred between May, 1977 and October, 1978, rather than between October 1, 1975 and December 31, 1979, as alleged. Even assuming the government failed to demonstrate the conspiracy was ongoing during the entire period alleged in the indictment, this variance was harmless since "the conspiracy proved fell within the period charged." *United States* v. *Postma*, 242 F.2d 488, 496-97 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957).

3. Appellant's argument that the government pleaded but failed to prove, as a part of the conspiracy, that Isenberg caused or induced individuals connected with the CETA training programs to falsify information, is also meritless. Three program counselors, charged with monitoring trainees' performance and ensuring they were receiving the appropriate number of hours of employment, testified to falsifying various documents on the instructions of Lee Isenberg. David Shurk stated he falsified records "to expedite the paperwork," and that Isenberg told the counselors he needed trainees "on the roll, and he didn't care how we did it, just don't get caught." On one occasion, Edward Burvick, another counselor, spent almost a week

at the offices of Lee Isenberg Associates falsifying paperwork, although he was supposed to be in the field supervising trainees. Burvick testified that Isenberg was aware of these activities, inquired "how long will it take?" and indicated his fear that they might be "caught" by the auditors. As to paragraph 11 of Count I, therefore, there was evidence from which, "giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt," *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), *quoted in United States* v. *De Garces*, 518 F.2d 1156, 1159 (2d Cir. 1975), and Judge Clarie properly denied the motion for judgment of acquittal.

4. Isenberg contends further that the acquittal of Edward Isenberg on the conspiracy count requires the same disposition as to him. This is a misstatement of the law. *E.g.*, *United States* v. *Artuso*, 618 F.2d 192, 197 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980).

5. The district court properly denied the Rule 29 motion as to the theft counts. The variances alleged to exist between the misappropriations estimated in the government's bill of particulars and the amounts proved at trial depend entirely on Cardone's testimony, and ignore the employees' own assessments of time spent working for CETA and Lee Isenberg Associates. Any variances which remain in no way prejudiced Isenberg. *United States* v. *Glaze*, 313 F.2d 757, 759 (2d Cir. 1963).

6. Cardone's testimony provided amply [sic] support for the government's case on Counts XXXIV-LVIII and for the jury's ultimate conclusion that Isenberg directed in detail the falsification of invoices and

other documents requesting reimbursement from CETA prime sponsors. The motion for judgment of acquittal on the false statement counts was correctly denied.

7. Appellant's claims of error in the district court's charge to the jury also have no merit. Judge Clarie directed the jury's attention to Cardone with instructions that Cardone's testimony was "to be received with caution and considered with great care," and further cautioned that "[t]he fact that an accomplice has entered a plea of guilty is not evidence of the guilt of any other person." The charge on accomplice testimony was therefore appropriate. *E.g.*, *United States* v. *Projansky*, 465 F.2d 123, 136 & nn.21 & 25 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

8. The district court's charge on Isenberg's testimony did not affect the presumption of innocence. The court was careful to emphasize the jury should not conclude "that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story." We have upheld similar instructions and have never accepted the argument that they improperly single out the defendant for special comment. *E.g.*, *United States* v. *Martin*, 525 F.2d 703, 706-07 & n.3 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975).

9. Judge Clarie's instruction that the government must prove "the members [of an alleged conspiracy] in some way or manner, or through some contrivance, positively or tacitly came to a mutual understading to try to accomplish a common and unlawful plan" correctly stated the elements of the crime of conspiracy. *United States* v. *Hockridge*, 573 F.2d 752, 760-61 & nn.22-23 (2d Cir.), *cert. denied*, 439 U.S. 821 (1978).

10. Materiality is a question for the court and Judge Clarie so charged the jury. *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967) (per curiam).

11. The judgment of conviction is affirmed in all respects.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,

/s/ WM H. TIMBERS
WILLIAM H. TIMBERS,

/s/ JON O. NEWMAN
JON O. NEWMAN, Circuit Judges

Excerpts from the Trial Court's Jury Charge

1. Defendant's Testimony

With respect to the defendants, Edward Isenberg and Lee Isenberg, who testified, you must carefully consider the testimony of each. An accused person is not obligated to take the witness stand in his own behalf. On the other hand, he has a perfect right to do so, as the defendants have done here.

In weighing the testimony each has given, you should apply the same principles by which the testimony of the other witnesses is tested, including the witnesses called by the Government. That necessarily involves a consideration of the interest each defendant has in the case. An accused person, having taken the witness stand, is before you just like any other witness. He is entitled to the same considerations, and may have his testimony measured in the same way as any other witness, including his interest in the verdict which you are called upon to render.

However, I want to say this with equal force to you: It by no means follows that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story.

It is for you to decide to what extent, if at all, the defendants' interest have affected or colored their testimony. . . . (T.T. 3812-13).

2. Materiality

The making of a false statement to an agency of the United States Government is not an offense, unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision, but rather is a matter for the decision of the Court. You are instructed that the statements charged in the indictment are material statements. (T.T. 3802).

No. 82-967

In the Supreme Court of the United States

OCTOBER TERM, 1982

LEE ISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly charged the jury concerning evaluation of petitioner's testimony.

2. Whether the trial court was required to submit the question of materiality to the jury in a prosecution of petitioner for making false statements in violation of 18 U.S.C. 1001.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. The petition for a writ of certiorari was filed on December 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes

any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement, or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371 (Count 1); theft of funds and assets that were the subject of grants and contracts of assistance funded under the Comprehensive Employment and Training Act of 1973 ("CETA"), in violation of 18 U.S.C. 665 and 2 (Counts 2-33); and making false statements on invoices submitted in connection with CETA-funded programs, in violation of 18 U.S.C. 1001 (Counts 34-58).[1] He was sentenced to concurrent terms of three years' imprisonment on Count 1 and two years' imprisonment on each of Counts 2-58. The sentences were to be suspended after petitioner served 90 days, following which he was to be placed on probation for a period of two years. Petitioner was also fined $10,000 on Count 1 and $5,000 on each of Counts 2 through 5, for a total fine of $30,000. The court of appeals affirmed.

1. The evidence at trial established that from October 21, 1975, to the end of 1979, petitioner controlled and supervised the activities of four nonprofit corporations that received approximately $2 million in federal funds under the Comprehensive Employment and Training Act of 1973, 29 U.S.C. 801 *et seq.* The funds were earmarked for job

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[1] Petitioner's co-defendant, Edward Isenberg, was convicted on 17 of the 58 counts, but the district court thereafter granted his motion for a judgment of acquittal. The court denied petitioner's motion for a judgment of acquittal.

training of unemployed and underemployed persons in the food service industry. During the same period, petitioner was president of Lee Isenberg Associates, Inc. ("LIA"), a trade association management firm serving the Associated Restaurants of Connecticut, among other clients (Tr. 2102-2104, 2132, 2286, 2358, 2495, 3420-3422, 3495; GX 112).[2]

By using cash fraudulently generated within the CETA-funded corporations, petitioner was able to "absorb" $400,000 to $500,000 in expenses incurred by LIA (Tr. 2369, 2495, 2816). These expenses included part or all of the salaries of 14 employees of LIA (Tr. 1948-1958, 2017, 2268, 2286, 2358, 2363, 2534, 2889-2892; GX 2-33, 117). These "absorptions" of LIA expenses constituted the thefts charged in Counts 2-33 of the indictment. The fraudulent documents used in generating the funds included false invoices submitted to CETA prime sponsors, CETA intake forms, and internal records of the CETA-funded corporations. Submission of the false invoices, which were prepared and submitted at petitioner's direction, resulted in payment of the salaries of the 14 employees of LIA from CETA grant funds by checks drawn against the payroll accounts of the CETA-funded corporations (Tr. 599, 619, 674-676, 753-766, 841, 851, 869, 889-893, 1328-1329, 2409-2494, 2618-2623, 2812; GX 2-58). The false statements contained in these documents formed the basis of Counts 34-58 of the indictment.

During 1976 through 1978, the employee payroll absorption scheme alone created an illegal benefit to LIA of approximately $208,000 by saving it the cost of the salaries of the 14 employees. Of that amount, $36,000 per year was transferred to Lee Isenberg Associates Training Services,

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[2] "Tr." refers to the transcript of the trial of petitioner and Edward Isenberg.

which served as petitioner's personal checking account. Petitioner caused an additional $9,000 per year to be diverted to New Horizon Developments, Inc., which in turn was a conduit for distributing money to petitioner's wife. The balance of the funds was distributed to the four partners of LIA, with more than half going to petitioner (Tr. 2513-2516, 2542-2583, 2613-2620, 2725-2726, 2784, 2928-2938, 2962-2990, 3593-3596, 3725-3728; GX 77-78, 124-125).

2. The district court charged the jury that the "law presumes a defendant to be innocent of crime" (Tr. 3769-3770). The court also charged the jury in a comprehensive manner concerning evaluation of the credibility of witnesses (Tr. 3805-3816). In the charge the court warned that the testimony of an accomplice witness who testifies for the government should be "received with caution and considered with great care" (Tr. 3811), that the testimony of an immunized government witness "should be examined * * * with greater care than the testimony of an ordinary witness" because the promise of immunity may provide "a motive to falsify" (Tr. 3812), and that the prior felony conviction of another witness could be considered in determining his credibility (Tr. 3810). The district court explained (Tr. 3809-3810) that "[a]ll evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should be considered with caution and weighed with great care."[3]

Thereafter, the court gave the following charge regarding petitioner's credibility (Pet. App. 6a; Tr. 3812-3813):

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[3]The district court further charged the jury that the testimony of a law enforcement officer "is entitled to no special or exclusive sanctity * * * you should not believe him merely because he is a law enforcement officer. You should evaluate his testimony, as you do that of any other witness." (Tr. 3815).

> With respect to the defendants, Edward Isenberg and Lee Isenberg, who testified, you must carefully consider the testimony of each. An accused person is not obligated to take the witness stand in his own behalf. On the other hand, he has a perfect right to do so, as the defendants have done here.
>
> In weighing the testimony each has given, you should apply the same principles by which the testimony of the other witnesses is tested, including the witnesses called by the Government. That necessarily involves a consideration of the interest each defendant has in the case. An accused person, having taken the witness stand, is before you just like any other witness. He is entitled to the same considerations, and may have his testimony measured in the same way as any other witness, including his interest in the verdict which you are called upon to render.
>
> However, I want to say this with equal force to you: It by no means follows that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story.
>
> It is for you to decide to what extent, if at all, the defendants' interest have affected or colored their testimony.

The district court also instructed the jury concerning the elements of the crimes charged in the indictment (Tr. 3783-3803). In connection with the counts charging violations of 18 U.S.C. 1001 (Counts 34-58), the court charged the jury (Pet. App. 6a; Tr. 3802):

> The making of a false statement to an agency of the United States Government is not an offense, unless the statement made is a material statement. The issue of

materiality, however, is not submitted to you for your decision, but rather is a matter for the decision of the Court. You are instructed that the statements charged in the indictment are material statements.

3. The court of appeals affirmed (Pet. App. 1a-5a). It rejected petitioner's argument that the district court erred in instructing the jury regarding petitioner's testimony. The court of appeals noted (*id.* at 4a) that "[t]he court was careful to emphasize the jury should not conclude 'that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story.' " Therefore, the instruction "did not affect the presumption of innocence" (*ibid.*). The court of appeals also rejected petitioner's claim that the district court erred in refusing to submit the issue of materiality to the jury, stating (*id.* at 5a,●) that "[m]ateriality is a question for the court." [4]

ARGUMENT

1. Petitioner contends (Pet. 13-17) that the district court's charge with respect to evaluation of a defendant's testimony improperly called attention to his interest in the case and thereby destroyed the presumption of innocence to which he was entitled. In addition, petitioner suggests the existence of a conflict among the courts on this question. These claims are insubstantial and do not warrant review by this Court.

When the instructions at issue are examined in the context of the overall charge and in light of the evidence and arguments at trial (see, *e.g.*, *United States* v. *Park*, 421 U.S.

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[4]The court of appeals concluded also (Pet. App. 1a-5a) that the evidence was sufficient to support petitioner's conviction and that the district court properly instructed the jury with respect to evaluation of accomplice testimony and the elements of the crime of conspiracy. Petitioner does not challenge these holdings before this Court.

658, 674-676 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), it is clear that they were entirely proper. There can be no doubt "that a testifying defendant has more to gain and less to lose than an ordinary witness from fabrications upon the witness stand." *Doyle* v. *Ohio*, 426 U.S. 610, 629 n.8 (1976) (Stevens, J., dissenting). Accordingly, it has long been recognized that a trial judge may properly call to the jury's attention the special interest of a testifying defendant. This Court so held in *Reagan* v. *United States*, 157 U.S. 301, 305 (1895) (emphasis added):

> It is within the province of the court to call the attention of the jury to any matters which legitimately affect [a defendant's] testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time *it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, therefore, a matter properly to be suggested by the court to the jury.* [5]

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[5]Petitioner's reliance (Pet. 14-15) on several decisions of this Court is misplaced. The Court in *Wilson* v. *United States*, 162 U.S. 613, 621 (1896), merely observed that the trial judge properly refrained from instructing the jury "to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses, and left it to them to give to his evidence, under all the circumstances affecting its credibility and weight, such consideration as they thought it entitled to receive." That observation is fully consistent with the charge approved by the court below. The other cases on which petitioner relies are also consistent with the instruction in this case, since they hold simply that a court may not suggest or express its opinion that the defendant's testimony is untruthful. See *Quercia* v. *United States*, 289 U.S. 466, 471-472 (1933); *Allison* v. *United States*, 160 U.S. 203, 207, 209-210 (1895); *Hicks* v. *United States*, 150 U.S. 442, 452 (1893). As the Court recognized, " '[i]t is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and,

The Court went on to state that "the court may, and sometimes ought, to remind the jury * * * that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony." 157 U.S. at 310.

The courts of appeals have repeatedly upheld instructions that specifically direct the attention of the jury to a testifying defendant's interest in the case. See, *e.g.*, *United States* v. *Ylda*, 643 F.2d 348, 352 (5th Cir. 1981); *United States* v. *Anderson*, 642 F.2d 281, 286 (9th Cir. 1981); *United States* v. *Floyd*, 555 F.2d 45, 47 & n.4 (2d Cir.), cert. denied, 434 U.S. 851 (1977); *United States* v. *Figurski*, 545 F.2d 389, 392 (4th Cir. 1976); *United States* v. *Wright*, 542 F.2d 975, 985-986 (7th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); *United States* v. *Hill*, 470 F.2d 361, 363-365 (D.C. Cir. 1972); *United States* v. *Rutkin*, 189 F.2d 431, 439 n.6 (3d Cir. 1951), aff'd on other grounds, 343 U.S. 130 (1952); see also *United States* v. *Morrone*, 502 F. Supp. 983, 991-993 (E.D. Pa. 1980), aff'd without opinion, 672 F.2d 905 (3d Cir. 1981), cert. denied, 455 U.S. 941 (1982).[6]

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perhaps, a judge cannot be considered as going out of his province in giving similar caution as to the testimony of the accused person.' "*Allison* v. *United States*, *supra*, 160 U.S. at 207, quoting *Hicks* v. *United States*, *supra*, 150 U.S. at 452.

[6]Thus, the holding of the court below with respect to the instruction on a defendant's testimony is in accord with the great weight of authority. Petitioner relies (Pet. 15) on several Eighth Circuit cases in which that court has indicated that it does not favor an instruction "singling out" a defendant. However, those cases do not present a significant conflict requiring review by this Court. Notably, the Eighth Circuit has not found that such instructions constitute cause for reversal when viewed in light of the evidence and the context of the charge as a whole. See *United States* v. *Standing Soldier*, 538 F.2d 196, 204 (8th Cir.), cert. denied, 429 U.S. 1025 (1976); *United States* v. *Bear Killer*, 534 F.2d 1253, 1260 (8th Cir.), cert. denied, 429 U.S. 846 (1976); *United*

Here the court instructed the jury concerning the presumption of innocence applicable to petitioner. In addition, the court stressed that " [i]t by no means follows that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story," and that petitioner's testimony was to be evaluated "in the same way as any other witness" (Pet. App. 6a). Moreover, the instruction was given in the context of a comprehensive charge regarding the credibility of witnesses, including specific cautionary instructions concerning the testimony of accomplices, convicted felons, and immunized government witnesses. Thus, the charge on witness credibility was balanced, accurate, and even-handed. Under those circumstances, the court of appeals properly concluded (*id.* at 4a) that the instruction at issue "did not affect the presumption of innocence."

2. Petitioner further contends (Pet. 17-20) that the district court erred in not submitting to the jury the question of the materiality of his false statements made in the invoices used to generate CETA funds fraudulently. He acknowledges (Pet. 17) that the court of appeals followed the "well settled" rule in the Second Circuit that "materiality is a question for the court" in a prosecution for violation of 18 U.S.C. 1001, but suggests (Pet. 18-20) that this rule conflicts with the practice of certain other circuits. That contention does not warrant further review.

We note initially that petitioner's contention has no relation to the theft counts and that his sentence does not meaningfully depend on his conviction for the violations of

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States v. *Brown*, 453 F.2d 101, 107 (8th Cir. 1971), cert. denied, 405 U.S. 978 (1972).

Petitioner also suggests (Pet. 16-17) the existence of a conflict among state courts on this point. Such a conflict would not warrant this Court's attention.

18 U.S.C. 1001 (Counts 34-58). No fine was imposed with respect to those false statement counts, and his sentences on them are otherwise equal to and concurrent with the sentences on the theft counts.

Petitioner cites no case in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury, and we are aware of none.[7] Our research has disclosed decisions of

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[7]Contrary to petitioner's suggestion, the great weight of authority among the circuits is consistent with the view of the courts below (Pet. App. 5a) that the issue of materiality under 18 U.S.C. 1001 is for the court to determine. See, *e.g.*, *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Ivey*, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960); *Weinstock* v. *United States*, 231 F.2d 699, 703 (D.C. Cir. 1956); see also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (1977 ed. & 1980 Pocket Part). Moreover, this Court has recognized that the materiality of false statements generally is a question for the court. In *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), construing the pertinency requirement of a statute proscribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. * * * And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

Most of the cases on which petitioner relies (Pet. 18-19) simply state that materiality is an essential element of 18 U.S.C. 1001. See, *e.g.*, *United States* v. *Voorhees*, 593 F.2d 346, 349 (8th Cir.), cert. denied, 441 U.S. 936 (1979); *United States* v. *Talkington*, 589 F.2d 415, 416 (9th Cir. 1979); *United States* v. *Radetsky*, 535 F.2d 556, 571 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *Freidus* v. *United States*, 223 F.2d 598, 601-602 (D.C. Cir. 1955); *Rolland* v. *United States*, 200 F.2d

two courts of appeals that indicate approval of the practice of submitting questions of materiality to the jury under 18 U.S.C. 1001. See *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *United States* v. *East*, 416 F.2d 351, 355 (9th Cir. 1969); *Gonzales* v. *United States*, 286 F.2d 118, 122 (10th Cir. 1960), cert. denied, 365 U.S. 878 (1961). But only two of these cases involved a finding that failure to submit the issue of materiality to the jury constituted error, and in both cases the court concluded that the convictions nevertheless should be affirmed because materiality had been so clearly established. See *United States* v. *Valdez*, *supra*, 594 F.2d at 729; *United States* v. *East*, *supra*, 416 F.2d at 353-355 (no prejudice from failure to instruct jury that materiality is an essential element since under the circumstances the materiality of the representations was established as a matter of law).

Here, there can be no doubt that petitioner's false statements in invoices submitted under the CETA program were material, *i.e.*, that they "could affect or influence the exercise of governmental functions" and had a "natural tendency to influence * * * agency decision," *United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir. 1981). Petitioner does not contend otherwise. See also *United States* v. *Voorhees*, 593 F.2d 346, 350 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false

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678, 679 (5th Cir.), cert. denied, 345 U.S. 964 (1953). That conclusion is consistent with the instruction given in this case (see pages 5-6, *supra*). See also *Johnson* v. *United States*, 410 F.2d 38, 46 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (stating that questions of materiality are for the trial court in a prosecution under 18 U.S.C. 287, but indicating that the issue of materiality in fact had been submitted to the jury).

statement was not material on the ground that it was incapable of producing illegal payments). Under the circumstances of this case, there is no basis for believing that any other court of appeals would have granted petitioner the relief he seeks. Thus, to whatever extent a conflict may exist, the present case does not provide an appropriate occasion for this Court to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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